



November 19, 2014

Submitted Electronically

Office of Regulations and Interpretation
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

RE: RIN 1210-AB59, Brokerage Window RFI

Ladies and Gentlemen:

Thank you for the opportunity to participate in the Department of Labor's Request for Information (RFI) regarding brokerage windows. We support the Department's efforts to ensure that plan participants who invest through brokerage windows and other similar arrangements receive appropriate protections under ERISA.

Empower™ Retirement is the second-largest retirement plan record keeper in the United States measured by the number of participants served. We provide services to more than 6.7 million participants in defined contribution plans of all sizes, ranging from fewer than 25 participants to more than 275,000, and in all markets, including 401(k), 403(b) and 457(b). We make brokerage window services available to plan sponsor fiduciaries in all of these markets and provide services to more than 47,000 brokerage window participants in approximately 1,400 defined contribution plans.

SUMMARY OF POSITION

Brokerage windows are requested by plan sponsor fiduciaries in order to meet the demands of participants whose investment objectives cannot be met by a plan's designated investment alternatives (DIAs). In our experience, they are not actively marketed or promoted by record keepers or other service providers. While Internal Revenue Code rules prevent plans from limiting their availability to active and knowledgeable investors, our usage data suggests that, as a practical matter, that is the population of participants who use them. None of the plans serviced by Empower Retirement offer a brokerage window only option — all of the plans we service that have brokerage windows also have a menu of DIAs selected by a plan fiduciary.

Empower Retirement supports clarifying the disclosure rules so that participants understand the differences in cost, risk and fiduciary oversight when investing through a window as compared to a DIA. We would also welcome clarification from the Department that standard restrictions applied to brokerage window investments (see Section 1 below) do not cause an arrangement to fall outside the Department's definition of a brokerage window.



We do not believe plan sponsors have a fiduciary obligation to monitor investment selections made within a brokerage window and strongly believe that any new rules that would increase a plan fiduciary's responsibility for monitoring the performance of brokerage window investments, or increase its reporting responsibility regarding those investments, would cause plan fiduciaries to cease offering these arrangements. Should the Department propose such rules, we encourage it to also establish a safe harbor for how to unwind brokerage window arrangements without violating ERISA as we believe many plan fiduciaries will choose to shut them down.

The remainder of our comments are provided in accordance with the RFI questions.

1. DEFINITION OF BROKERAGE WINDOW – Qs 1-3

In general, our brokerage window offering allows plan sponsor fiduciaries to choose between a window offering any type of investment that is permitted by ERISA or a mutual fund only offering. All of our brokerage window investors are restricted from investing in margin accounts; precious metals; commodities; physical assets; annuities; life insurance policies; trade-away trades; alternative investments; collectibles; futures; currencies; short sales; private placements or limited partnerships; options other than covered calls or protective puts; and promissory notes. Plan sponsor fiduciaries can also choose to add restrictions including limiting the percent of a participant's account that can be invested in the window and/or requiring a minimum investment in DIAs, use of vested funds only, no load/no transaction fee funds only, mutual funds only, listed stocks only, prohibiting investment in specific mutual fund families or individual mutual funds, or prohibiting investment in employer stock.

Empower Retirement does not offer the option of limiting investments to specific funds or fund families or any other restriction that would have the potential effect of steering participants toward proprietary investment products.

We are confident that these restrictions do not cause the arrangement to be treated as anything other than a brokerage window under the Department's rules, but would welcome clarification from the Department to that effect.

2. BROKERAGE WINDOWS AND DIAs – Qs 4-8

Brokerage windows are used in plans of all sizes, but tend to be used more frequently in large plans (5% of small plans and 50% of large plans that we service currently use them). This percentage has remained fairly consistent, and we do not see any trends either toward or away from offering brokerage windows.

The number of DIAs offered has generally increased over the years, and currently the average offering is 22-23 funds. We do not see any correlation between the use of a brokerage window and the number of DIAs offered, which is indicative of the reality that plan fiduciaries are not using brokerage windows as a strategy for avoiding the fiduciary oversight and disclosure responsibilities involved with using DIAs.



3. PARTICIPATION IN BROKERAGE WINDOWS – Qs 9-14

When a brokerage window is available to plan participants, typically only 1-2% actually uses it, and the percent of total plan assets invested through the window is 3-5%. Participants using the window tend to invest about half of their account in DIAs and the other half in investments accessed through the window. Brokerage window investors tend to invest more broadly in DIAs, investing in nine to 10 DIAs as compared to non-brokerage window investors who average four or five DIA investments.

Across all of our plans, the majority of brokerage window investors are aged 50-59. In the large market, these investors are higher paid employees with an average salary of \$99,000. Brokerage windows are used for a wide variety of purposes. For example, you may have one participant who just wants to access a specific fund in which to invest 5% of his or her account; another who wants to put 100% of his or her account in an investment designed to generate fixed retirement income; and another who wants to access a wide variety of investment vehicles. Broker windows are also often made available because participants want to access Exchange Traded Funds (ETFs) or other assets that cannot easily be accommodated on a plan's recordkeeping system. Due to the variety of goals and ways in which brokerage windows are used by participants, we do not believe that measuring volatility and returns as compared to participants investing 100% in DIAs would provide meaningful information for the Department's purposes.

Participants benefit from having brokerage windows available to them because it allows for highly customized/individualized investment decisions. Having the option to customize may encourage plan participants to place more of their savings in their retirement plan and to keep funds in the plan even after they become eligible for a distribution. While the overall number of brokerage window users is small, our experience shows that they are more likely to keep their account in a tax-protected retirement vehicle when faced with a distribution decision. Data from our large market plan segment indicates that participants with a brokerage account are 32% less likely than participants without a brokerage account to cash out their account upon becoming eligible for a distribution. Participants not using an available window also benefit from having money stay in the plan to spread the cost of plan administration, as well as from having a potentially less confusing list of DIAs than might be necessary if a window wasn't offered.

4. SELECTION AND MONITORING OF BROKERAGE WINDOWS AND SERVICE PROVIDERS – Qs 15-21

A plan sponsor fiduciary will usually have only one or two options available from its plan's record keeper for brokerage window services. The main reason is that there are a small number of brokerage window providers available, and the costs involved in setting up and maintaining an arrangement between a record keeper and a brokerage window provider are substantial. From a record keeper's perspective, using a brokerage window means that assets are held on a separate system and significant coordination is required for purposes of participant communication, reporting and disclosure as well as for government reporting. From Empower Retirement's perspective, neither record keepers nor brokerage



window providers actively market or promote brokerage windows to their existing or potential plan sponsor clients. Rather, brokerage windows are made available by record keepers in response to market demand from their plan sponsor clients.

Plan sponsors typically seek brokerage windows in order to satisfy the demands of more active and knowledgeable investors and/or to make investments available that are not supported by the plan's recordkeeping system. Using a window is not currently viewed as altering the plan sponsor's disclosure obligations or decreasing its fiduciary risk. However, if the Department were to require more active monitoring or an investment-specific disclosure of brokerage window investments, it is likely that plan sponsors would cease offering them due to the cost and complexity of these additional requirements as well as the increased fiduciary exposure.

Following is a description of how the selection process and contractual arrangements typically work:

1. A record keeper selects a brokerage window provider and enters into a contractual agreement with the provider to provide services to any of its plan sponsor clients who choose to use the service.
2. A plan sponsor selects a record keeper, taking into account the availability, cost and other factors regarding the brokerage window service it offers.
3. The plan sponsor signs a contract with the record keeper and a separate contract with the brokerage window provider.
4. Participants using the window sign an agreement with the brokerage window provider.

As illustrated above, the selection and monitoring of the brokerage window provider by the plan sponsor fiduciary is typically incorporated into the process for selection and review of the plan's record keeper. Plan sponsor fiduciaries sometimes have the ability to negotiate the record keeper's administrative fee for maintaining the window, but they do not have the ability to negotiate trading or other costs charged by the brokerage window provider. It is not economically feasible for a record keeper to offer "open architecture" brokerage window services and, even if it were, the limited number of available providers would cause this to be of little value to plan fiduciaries.

5. FIDUCIARY ACCESS TO INFORMATION ABOUT INVESTMENTS – Qs 22-24

All of Empower Retirement's plan sponsor fiduciaries who offer brokerage windows receive an annual report, which includes, for each participant in their plan invested through the window, a list of their investments with beginning balances, contributions and earnings, distributions, and ending balances. They also receive, in connection with Form 5500 reporting, a list of all fees charged to the plan or participants by the brokerage window vendor. More frequent reports, as well as the ability to manipulate data in the annual report via download to an Excel spreadsheet, can be provided upon request.



Brokerage window vendors do not report performance information or some of the other data elements required to be disclosed for DIAs per the Department's service provider or participant disclosure rules. Because investments are held at the brokerage window provider, not the record keeper, it would be the provider who would bear the expense of developing the capability to produce more detailed reports, and we do not have information on what those costs would be or what the technological challenges are. However, given the fact that brokerage window investors have access to tens of thousands of investment options and there is usually only one or a very limited number of investors in any single option, we would anticipate both the cost and the technological challenge to be significant.

It is also important to note when analyzing potential costs that the systems brokerage window vendors use are designed to comply with securities law disclosure rules, not DOL Reg. §404a-5, so there would be significant costs involved in applying the DOL's participant disclosure rules for DIAs to brokerage window investments. These costs would most likely result in increased fees for participants using a window. We also know from interactions with plan sponsor fiduciaries that, if they were required to review and be held responsible for the performance of brokerage window investments, they would most likely cease offering them.

6. BROKERAGE WINDOW COSTS – Qs 25-28

Brokerage window costs can be broken into two categories: costs charged by the plan's record keeper and costs charged by the provider of the window. The costs charged by the provider are the most significant costs involved in brokerage window investing and are borne 100% by the individual participant using the window. These costs typically include commissions and transaction fees; account activity fees (e.g., a short-term redemption fee); distribution fees; custody fees; research fees; fees for duplicate statements or confirmations; and fees for special services, such as options trading. All of these fees are disclosed up front to both plan sponsor fiduciaries and participant investors.

Costs charged by the plan's record keeper include the costs of data collection and integration, participant disclosure and reporting, and other costs for supporting the window. Plan sponsor fiduciaries have some discretion in terms of how to pay the administrative fee charged by the record keeper. The majority of plan sponsors charge 100% of this fee to the accounts of participants using the service. The fee may also be waived by the record keeper or may be rolled in to a general administrative fee that is allocated across all participant accounts. The rationale for spreading this cost is that all participants benefit from having access to the brokerage window and that access can only be provided if certain administrative expenses are incurred.

Plan sponsor fiduciaries do consider cost when deciding whether to offer a brokerage window service, and this information is typically sought in Requests for Proposals (RFPs) in plans seeking new service providers. The brokerage window provider reports its fees annually to the plan sponsor fiduciary for purposes of Form 5500 reporting. The record keeper discloses fees to the plan sponsor in compliance with DOL Reg. §408(b)(2).



7. DISCLOSURES CONCERNING WINDOWS AND UNDERLYING INVESTMENTS – Qs 29-32

Participants investing through a brokerage window are provided with information from two sources: the plan sponsor (either directly or through its record keeper) and the brokerage window provider. The plan sponsor's disclosure responsibilities are defined in DOL Reg. §404a-5 and include both an initial and annual disclosure describing the window and any fees associated with using it, as well as a quarterly disclosure of any fees charged to its account and the services provided. While participants were receiving similar information prior to the enactment of the participant disclosure rule, we believe that disclosures were updated and improved as a result of the rule.

Participants also receive information from their brokerage window provider. This includes materials provided in setting up the arrangement such as a description of fees and services and other disclosures. Participants also receive confirmations of account activity and either a monthly or quarterly report disclosing investment positions held and any transaction activity for the period. While DOL rules do not mandate these disclosures, they are mandated by securities laws. Specifically, SEC Rule 10b-10 requires that participants receive confirmation of any transaction activity, and FINRA Rule 2340 requires them to receive a quarterly statement including investment positions and account activity.

In addition to receiving these required disclosures, brokerage window investors have access to prospectuses, information from investment rating services, and other publicly available information. Brokerage window investors tend to be more actively engaged than other retirement plan investors, so they are more likely to seek out this information.

We believe that the required disclosures under DOL and SEC rules, along with investment information that is publicly available, are sufficient to fully inform and protect plan participants investing in brokerage window accounts. We would, however, support the Department clarifying that the current participant disclosure rule requires a description of the difference in costs, risks and fiduciary oversight when investing in a brokerage window as compared to a DIA.

8. THE ROLE OF ADVISERS – Qs 33-36

In our experience, plan sponsor fiduciaries typically do consult with their financial adviser when deciding whether and what type of brokerage window to include in their plan. This decision is usually made in the context of looking at the whole investment menu and the specific investment needs of the participant population.

In terms of the availability of professional investment help to brokerage window investors, plan sponsor fiduciaries do not select the adviser, but they do decide whether to allow the fees of an adviser to be deducted from participant accounts. If deduction of an adviser's fees is permitted, the participant (not the plan sponsor or other fiduciary) selects his or her own adviser. Only a small number of the brokerage window investors we serve (13% or less) use advisers in this way. Participants could also be getting help



from their own financial adviser that they pay from personal assets, not plan assets, and neither the plan sponsor fiduciary nor the record keeper would have any information about those arrangements.

9. FIDUCIARY DUTIES – Q 37

As discussed throughout this letter, brokerage windows are typically offered in order to satisfy the investment needs of more active and knowledgeable investors. If not prohibited by Treas. Reg. §1.401(a)(4)-4, plan sponsor fiduciaries would most likely limit access to brokerage windows to these types of investors. Actual experience has shown that, while the plan document cannot contain this type of restriction, as a practical matter, brokerage windows are self-selected by active investors and avoided by those who are not interested in spending the time necessary to make investment decisions outside the scope of a plan's DIAs.

The decision to offer a brokerage window is usually a participant driven decision. In our experience, plan service providers do not promote them, and plan sponsor fiduciaries will usually only consider them if participant demographics warrant their inclusion. The plan as a whole benefits from brokerage window access because it allows for simpler DIA menus while simultaneously meeting the investment needs of all participants.

Plan sponsor fiduciaries have historically understood their responsibilities when offering a brokerage window to include the prudent selection and monitoring of the brokerage window provider and the provision of disclosure material to participants investing in the window. This includes ensuring the fees for the window are reasonable; the vendor is executing transactions and otherwise meeting service goals; any participant complaints about the vendor are responded to; and participants are receiving all of the disclosures the Department has determined are appropriate.

All of Empower Retirement's plan sponsors receive information at least annually about brokerage window investment positions and fees, including beginning balances, gains and losses, expenses, and ending positions. However, they do not understand their responsibility to include monitoring the performance of those investments or providing investment-specific disclosures to participants beyond those provided by the brokerage firm vendor. The reason the Department's issuance of FAB 2012-02 raised questions was because it suggested that this common understanding was not valid and that plan fiduciaries do have a responsibility to monitor performance of brokerage window investments and provide detailed performance reporting in some circumstances. Brokerage window vendors do not provide this performance reporting today and there would likely be significant cost involved in creating that type of report. Even if performance reporting were available, it is unlikely that plan sponsor fiduciaries would be willing to take on the additional time and risk involved in monitoring investments in an open ended investment environment.

This common historical understanding of a fiduciary's role in relation to the monitoring and reporting of brokerage window investment was created and is supported by prior guidance from the Department.



DOL Reg. §404c-1(d)(iv) requires plan fiduciaries to prudently select and monitor any DIA offered by a plan intending to be 404(c) compliant, and DOL Reg. §2550.404(c)-1(e)(4) defines DIAs as “a specific investment identified by a plan fiduciary as an available investment alternative under the plan.” This understanding that plan fiduciaries are not responsible for the selection and monitoring of investments selected by participants within a brokerage window arrangement was reinforced by the Department’s disclosure rules. Specifically, DOL Reg. §§404a-5(h)(4) and 408b-2(c)(1)(viii)(C) exclude from the disclosure requirements applicable to DIAs “brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.” The Department’s prior guidance is consistent with the practical reality that it would place an unreasonable burden on plan fiduciaries to be held accountable for investment decisions made by participants in an open-ended investment environment.

We believe that the Department’s prior guidance and the current understanding of a fiduciary’s role in relation to brokerage windows strikes the right balance between protecting investors and avoiding unnecessary plan expenses. Brokerage window investors represent a very small percentage of participants in plans offering them (1-2%) and are knowledgeable investors taking an active role in designing their investment portfolios. The Department’s current disclosure rules, as well as the administrative costs and complexities involved with setting up a brokerage window account, are adequate protection against inexperienced or unprepared participants inadvertently investing through a window. The relatively high cost of requiring more investment-specific disclosures or fiduciary oversight of the investment decisions made within a window are not justified by any need on the part of brokerage window investors for more active fiduciary oversight.

For all of these reasons, we recommend that the Department not issue additional guidance on fiduciary standards and support the current understanding of a fiduciary’s responsibility in relation to brokerage window investments. If the Department does not agree with this position and intends to issue additional guidance, we strongly encourage it to also provide a safe harbor for plan fiduciaries on how to eliminate brokerage windows from a plan as we anticipate many plans will want to take this action and there are significant fiduciary challenges in doing so.

10. ANNUAL REPORTING AND BENEFIT STATEMENTS – Qs 38-39

Any changes to the level of detail required in Form 5500 reporting or in participant benefit statements would require the development of new reporting capabilities by brokerage window providers as well as developments to integrate that reporting into a plan’s record keeping and/or 5500 preparation systems. Many of these costs would be borne by all participants in a plan, even though only 2% or fewer actually use the window feature. Because participants receive detailed reporting of their brokerage window investments on a monthly or quarterly basis and plan sponsor fiduciaries receive an annual report in connection with Form 5500 reporting, we do not believe that the cost of developing additional reporting functionality is warranted by the potential benefits.



The information participants see on their quarterly benefit statement about their brokerage window investments includes a description of the percentage of their total account invested in brokerage. All brokerage investments are rolled in to a single number for which is reported the beginning balance, deposits, earnings or losses for the period, transfers, fees or withdrawals, and ending balance. Participants also see the total rate of return for the current period and year to date, and that number includes earnings experience in their brokerage window investments. While participants do not see detail on their individual brokerage investments in the benefit statement, they do receive this information at least quarterly from the brokerage window vendor.

Thank you for this opportunity to comment in the RFI, and we look forward to working with you on this and other initiatives to improve the retirement security of America's workers. Please to not hesitate to contact me with any questions about our response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ed Murphy III", is written over a large, light blue circular scribble.

Edward F. Murphy III

President Retirement Services